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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, v. ROGER DELANE WILSON, Defendant.	Case No.: CR 2017-00516 **MOTION TO DISMISS INDICTMENT/MOTION TO DISMISS FIRST DEGREE MURDER CHARGE** Assigned to Judge Conlogue

COMES NOW the Defendant, ROGER D. WILSON, by and through his attorney, STEVEN D. WEST, and hereby moves to dismiss the indictment, or, in the alternative, to dismiss the charge of first degree murder, pursuant to *Rule 16.4(b)* of the *Arizona Rules of Criminal Procedure*.

This motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

The defendant has been charged in a six (6) count indictment with one count of first degree murder of J.D. Arvizu, one count of second degree murder of J.D. Arvizu, one count of manslaughter of J.D. Arvizu, one count of disorderly conduct, and two counts of misconduct with weapons as a prohibited possessor. The charges all stem from a single incident that occurred on June 22, 2017.

I. Incorrect Instructions to the Grand Jurors

This case was first taken before the grand jury on June 29, 2017.[1] At the time of that presentation, the State improperly presented incorrect instructions to the grand jury and related facts through an improper procedure. The State virtually read from a transcript and/or notes of the defendant's statement to Det. Borquez, the lead officer on this case and the only witness testifying before the grand jury, to which he simply answered "yes". Notwithstanding that the prosecutor asked leading questions (no less than 191 times), the most egregious fact was that the instruction on first degree, premeditated murder was totally incorrect (R.T. 6/19/17, p. 8, lines 1-7), and

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[1]The defendant is not arguing pursuant to *Rule 12.9* of the *Arizona Rules of Criminal Procedure*, but is presenting information relating to that presentation merely to set the stage and provide a complete history of the case for the court, as it relates to this motion to dismiss under *Rule 16.3* of the *Arizona Rules of Criminal Procedure*.

not an instruction that has been used since 2003.[2]

The problem was not rectified, because when the case was taken back to the grand jury on February 15, 2018, the same prosecutor again read the incorrect instruction on premeditation. (R.T. 2/15/18, p. 7, lines 3-10). Though she admitted that this was the wrong instruction to have been read, it served no other purpose than attempt to reinforce that incorrect information by reading it yet one more time. She then read one version of the *Thompson* instruction, eliminating the second paragraph (R.T. 2/15/18, p. 7, lines 16-25), while the old version remained in the grand jurors' notebooks, until she decided it would be wise to remove it. (R.T. 2/15/18, p. 8, lines 16-18). At the same time, it was noted that A.R.S. § 13-421, that provides the justification for displaying a firearm, was discussed, but it was not in the grand jurors' notebooks, even though it had been the law since 2009. (R.T. 2/15/18, p. 24, lines 3-10).

This issue became extremely important when one of the grand jurors asked a question about the "time" it took to actually reflect (R.T. 2/15/18, p. 91, lines 12-19): the specific question that the Arizona Supreme Court was attempting to avoid. The court's use of the language "regardless of the length of time," was an attempt to

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[2]See *State v. Thompson*, 204 Ariz. 471, 65 P.3d 420 (2003) (eliminating the requirement of finding reflection in premeditation definition, rendered the statute unconstitutional and caused the defendant to be denied his due process rights).

have jurors **not** focus on the length of time, but to disregard that issue, and determine whether there was evidence that, in fact, showed that there was actual reflection. As the court pointed out, "premeditation means that the defendant intended to kill or knew that he would kill another human being and that after forming that intent or knowledge, reflected on the decision before killing." *Thompson*, 204 Ariz. 471. The legislative intent and the *Thompson* ruling wanted to ensure that the mere passage of time was not substituted for elements of premeditation.

II. Irrelevant and Improper Evidence of Other Bad Acts was Presented

Additional impropriety occurred when the prosecutor elicited testimony before the grand jury that the defendant is a prohibited possessor, and that he is not authorized to be in possession of a weapon. (R.T. 2/15/18, p. 63, lines 13-17). Not only did the State invade the province of the grand jury in vouching for its case and stating that the defendant should be charged with the proposed offenses relating to weapons misconduct, but the State went further and discussed the fact that Mr. Wilson had two prior convictions. (R.T. 2/15/18, p. 63, lines 18-25).

The evidence presented was confusing to the grand jurors, as exemplified when a grand juror did not understand why two counts of weapons misconduct had been charged. (R.T. 2/18/15, p. 92, lines 8-11). Rather than elicit additional information from a witness, the prosecutor blatantly set forth her belief that there

were two distinct incidents utilizing the same weapon, and, therefore, the charges were appropriate. Once again, she virtually testified and invaded the province of the grand jury to deliberate and determine the facts and decide whether there was probable cause to charge those specific statutes.

The grand jury was informed that there were other incidents that occurred relating to the defendant and his mother.[3] (R.T. 2/15/18, pp. 84-85). The grand jury was then informed that when the defendant related an incident in which is mother was involved, it was stated that there "was no evidence or footprints or evidence outside the house, no biological evidence as far as DNA or blood located at that house. So, there was no evidence that someone was actually doing" what the defendant's mother had alleged. (R.T. 2/15/18, p. 85, lines 5-9). This impropriety was meant solely to disparage the defendant and his mother, so that the grand jurors would come to the conclusion that the State's proposed, pre-drafted indictment, is what the defendant should be indicted on.

The prosecutor asked leading questions, too many to cite here, in which, on one instance, she described Mr. Arvizu's statements as a "dying declaration." (R.T.

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[3]The State improperly gave the grand jurors a transcript of the defendant's statement to Detective Borquez without properly redacting it. This is information that clearly would not be permitted to be presented at trial, and it was totally improper for it to be presented at a probable cause hearing.

2/15/18, p. 72, lines 9-11). This too was an improper presentation of the incident in which the prosecutor was clearly testifying rather than eliciting evidence from the witness stand, as well as making value judgments about the evidence.

III. Improper Trajectory Evidence and Conclusions Were Presented

Lastly, the grand jurors were told that the evidence indicated "that J.D. was not standing upright towards him (Roger Wilson), that the shot came at a downward angle." "...either J.D. was moving to the tailgate and was falling as the shot entered him, so he wasn't standing upright." "Mr. Wilson **claims** J.D. was charging him. If you are charging me and I shoot you straight on, the round is going to enter you straight, not at a downward angle." (R.T. 2/15/18, p. 79, line 21, to p. 80, line 5). The State knew (or should have known) that this information was misleading, at best and amounted to pure speculation. No foundation nor expertise whatsoever was presented on this issue to allow the State to present this to the grand jury.[4] In fact, when Dr. David Winston was interviewed by one of Mr. Wilson's prior counsel, he was specifically asked about trajectory, and he stated 1) that he could not place a value or number to describe the angle of the bullet path; and 2) he was totally unable to talk about the positioning of the bodies of either the shooter or the victim at the time of the incident. (Winston interview, p. 17, lines 6-13; p. 36, lines 10-12).

[4]The defendant is filing a separate motion on this issue in order to preclude these unilateral conclusions from being elicited by the State at trial.

STATEMENT OF LAW

I. THE INDICTMENT SHOULD BE DISMISSED

A. DENIAL OF DUE PROCESS RIGHTS

The instant motion is presented to the court pursuant to *Rule 16.4(b)* of the *Arizona Rules of Criminal Procedure.* While the remedy is generally to remand to the grand jury for a new finding of probable cause, a dismissal under *Rule 16.4(b)* of the *Arizona Rules of Criminal Procedure* is appropriate under circumstances such as appear in the instant case. In *State v. Young*, 149 Ariz. 580, 720 P.2d 965 (App. 1986), the court stated:

> While a remand is the only remedy specified in Rule 12.9, the court does not lose its power to correct violations of due process merely because they occur within the context of a grand jury proceeding. See *Marston's Inc. V. Strand*, 114 Ariz. 260, 560 P.2d 778 (1977); *State v. Good*, 10 Ariz. App. 556, 460 P.2d 662 (1969). The power of the grand jury is not unlimited, and that power is subject to judicial control. *Marston's Inc.*, 114 Ariz. at 265, 560 P.2d at 783. Arizona has a history of judicial control of grand jury abuse. See *State v. Good, supra; State v. Von Reeden*, 9 Ariz. App. 1990, 450 P.2d 702 (1969); *Corbin v. Broadman*, 6 Ariz. App. 436, 433 P.2d 289 (1967).

As in *State v. Alexander*, 108 Ariz. 556, 503 P.2d 777 (1972), the testimony from the grand jury proceeding was "inherently suspect". The *Alexander* court pointed out that the United States Supreme Court has emphasized that the testimony given at a preliminary proceeding to establish probable cause, ordinarily carries fewer "indicia

of reliability" than testimony at trial, citing *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). In the instant case, the grand jury determined that there was probable cause on false evidence and incorrect law. The grand jury was misled by statements made by the detective and the general presentation by the State. Thus, the determination that probable cause existed to proceed with this case must be deemed invalid. The State is not permitted to present false and misleading evidence to the grand jury in order to obtain an indictment. *United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974).

Justice Feldman stated in his dissent in *State v. Hyde*, 186 Ariz. 252, 921 P.2d 655 (1996), great care must be taken to avoid mixing up facts that stem from the police investigation and other facts, that might have been presented in making a determination of probable cause. The court stated in *Nelson v. Roylston*, 137 Ariz. 272, 669 P.2d 1349 (App. 1983):

> ...we note that it is not the fact that the testimony is perjurious but rather that evidence, whether intentionally or unintentionally false, has been presented to the trier of fact and is used as a basis for finding probable cause.

The court in *Nelson v. Roylston, supra*, also pointed out that it is the obligation of the State to correct the record when a witness has testified to misleading information before the grand jury. At the same time, that does not mean that the prosecutor herself may interject information. She must elicit the information from a proper

source. Under circumstances such as these, the defendant is entitled to have the indictment dismissed as a matter of law. The grand jury must not be permitted to rely upon the false statements of a witness or the prosecutor when those statements are based on personal interpretations of the evidence and mis-application of the law. The prosecutor's comments provided proof positive that the defendant was denied not only a substantial procedural right during the presentation to the grand jury, but he was denied his due process rights.

B. THE INDICTMENT VIOLATES DOUBLE JEOPARDY

The law requires that each count charged be for separate and distinct offenses. In Arizona, there is a standard jury instruction that is given that states exactly that. See RAJI, Standard Criminal 35. In addition, the double jeopardy clause of the Fifth Amendment to the United States Constitution and Article 2 § 10 of the Arizona Constitution, not only preclude a second prosecution of a crime, but protect citizens against multiple punishments for the same crime. Someone cannot be charged with both murder and manslaughter for the same death, as the State did in this case.

"Lesser included offenses," besides relating to the non-constitutional right to a jury instruction, also involves the constitutional right and protection against multiple prosecutions for the same crime. *Lemke v. Rayes*, 213 Ariz. 232, 238, 141

P.3d 407, 413 (2006); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

The indictment in this case is fatally flawed, because the State has failed to charge three different crimes in the first three counts of the indictment. The State has ignored the fact that the charges of second degree murder and manslaughter are lesser included offenses to first degree, premeditated murder. The way in which the indictment charges all three offenses puts the defendant in double jeopardy in violation of the Fifth Amendment to the United States Constitution.

In *State v. Williams*, 232 Ariz. 158, 302 P.2d 683 (2013), the court held that one of convictions for which the defendant was found guilty of both first degree felony murder and second degree murder, could properly be vacated. In the instant case, the distinction that the defendant is charged with first degree premeditated murder and not felony murder, precludes a trial under this indictment. It is improper for a person to be convicted of multiple murder charges of a single victim. *State v. Williams*, 232 Ariz. at 160 ¶7, citing *Ervin v. State*, 991 S.W.2d 804, 807 (Tex. App. 1999); and *Gray v. State*, 463 P.2d 897, 911-912 (Alaska 1970).[5]

It would be totally improper for the State to amend the indictment without a new presentation to the grand jury. The improper instruction on the issue of

[5]In *Williams*, the indictment was properly charged, because felony murder does not have any lesser included offenses. However, since premeditated does have lesser included offenses, it was improper in this case to charge the lesser included offenses in two additional counts.

premeditation and reflection as it relates to first degree murder, makes it impermissible as a matter of law for the charge to be sustained. At the very least, the charge of first degree murder must be dismissed as a matter of law.

C. IMPROPER EVIDENCE WAS USED TO PREJUDICE THE DEFENDANT

The State has several avenues it could have taken to prove probable cause to indict Mr. Wilson on a weapon's charge, none of which involved the grand jurors being told anything about more than one prior conviction, other bad act incidents, and clearly nothing relating to his mother and a prior incident in which she was involved.

The introduction of prejudicial *Rule 404(b)* evidence relating to either the defendant and/or his mother should never have been a part of the grand jury presentation. In order to establish an exception to the preclusion of the evidence under *Rule 404(b), Arizona Rules of Evidence*, there must be a "particular plan of which the charged crime is a part." *State v. Ives*, 187 Ariz. 102, 927 P. 2d 762 (1996). Even mere similarity of two acts does not alone prove that the conduct was part of a common scheme or plan. *State v. Ives, supra.* Thus, by allowing the State to introduce allegations of the other acts, it effectively showed the grand jury that the defendant acted in conformity with some alleged prior activity, which is the "very essence of what *Rule 404(b)* forbids". *State v. Hughes*, 189 Ariz. 62, 938 P. 2d 457 (1997). Evidence is unfairly prejudicial when it has a tendency to prove a fact on an

improper basis such as emotion, sympathy, or horror. *State v. Salman*, 182 Ariz. 359, 897 P. 2d 661 (App. 1994).

The prejudicial nature of the presentation denied the defendant his due process rights. Therefore, the only remedy available is a dismissal of the charges.

RESPECTFULLY submitted this 11th day of July, 2019

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Copy of the foregoing
mailed/delivered this date to:

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